IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 204 of 1989

For Approval and Signature:

Hon'ble MR.JUSTICE R.K.ABICHANDANI
and
Hon'ble MR.JUSTICE K.M.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

SIRHIND STEEL PVT.LTD.

Versus

COMISSIONER OF INCOME TAX

Appearance:

1. INCOME TAX REFERENCE No. 204 of 1989
MR RK PATEL for Petitioner
MR TANVISH U BHATT for Respondent

CORAM : MR.JUSTICE R.K.ABICHANDANI
and
MR.JUSTICE K.M.MEHTA

Date of decision: 21/04/2003

ORAL JUDGEMENT

(Per : MR.JUSTICE R.K.ABICHANDANI)

#. The Income-tax Appellate Tribunal Ahmedabad Bench "B" has referred the following questions, one each, at the instance of the assessee and the Revenue, for the opinion of this Court under Section 256(1) of the Income-tax Act, 1961.

"R.A. Nos. 519 & 520/Ahd/1989
A.Ys. 1983-84 and n1984-85
By the assessee.

(1) Whether on the facts and in the circumstances of the case, the provisions of Section 40A(2) were applicable?"

R.A. No. 562/Ahd/1989 (By the Revenue)
Asstt. Year: 1984-85.

(1) Whether, the Appellate Tribunal is right in law and on facts in deleting the addition made by the I.T.O. invoking the provisions of Section 43B and directing the I.T.O. to allow the relief subject to necessary verification?"

#. The question referred at the instance of the assessee has a bearing on the provisions of Section 40A(2) of the Act. As per the admitted facts, the assessee Company and three persons who were its Directors, had formed a partnership firm of four partners. Later on, there was a dissolution of the firm by which the assessee Company took over the rights and liabilities of the other partners. Under Clause-5 of the deed of the dissolution, the assessee Company had agreed to credit the amounts stated therein to the respective Sharafi accounts of the parties of the first, second and third part i.e. three other partners, as their share in the firm on dissolution of the firm. As stated in Clause-6 of the deed of the dissolution, since the assessee Company was not in a position to make payment in full of the amounts mentioned in Clause-5 (total of Rs. 12,23,761.80 ps.), it agreed to retain the amount of Rs. 2.00 lacs in each of the respective Sharafi accounts of the three other partners with the assessee Company for a minimum period of ten years and in consideration thereof, stipulated to pay to each of them for a period of ten years, either of the amounts as stated in Para (A) or in para (B), below whichever amount was more:

"(A) To each of the parties hereto of the First Part, Second Part and Third Part, amount representing 5% (Five percent) of not profits for the year, of the said business carried on by the party hereto of the Fourth Part, to be computed in the manner laid down under section 349 read with Section 350 of the Companies Act, 1956 but without deduction of Sur Tax.

Provided however that no deduction shall be made of amounts payable to the parties hereto of the First Part, Second Part and Third Part for ascertaining the amount of net profits for the year, for calculation of amount payable to the parties of First Part, Second Part and Third Part.

(B) Amount representing interest at the rate of 15% (Fifteen percent) per annum on the amounts credited to Sharafi Accounts of each of the parties hereto of the First Part, Second Part and Third Part as stated above.

The amount payable under Para A or Para B shall be paid within a period of six months from the close of the accounting year of the firm.

On expiry of ten years period, the party hereto of Fourth Part shall refund the Deposit of Rs. 2,00,000/- (Rupees two lacs only) to each of the parties hereto of First, Second and Third Part within three months or in such period as may be agreed mutually."

In Clause-7 of the deed, it was agreed that the assessee Company shall refund excess over Rs. 2,00,000/- (Rupees two lacs only) deposit payable to the parties of First Part, Second Part and Third Part (i.e. three individual partners), within the period of six months or in such period as may be mutually agreed.

#. After the various clauses of the deed for dissolution were discussed and the provisions of Section 40A(2) were read, the learned counsel for the assessee rightly submitted that in view of the fact that the three individual partners were also the Directors of the assessee-Company and the payments which were claimed by

way of expenditure were made by the assessee Company to its Directors, as contemplated by Section 40A(2) of the Act, 50% of which have been found to be acceptable by the Tribunal, the assessee does not now press for the question which has been referred at its instance.

3.1 The learned counsel for the Revenue points out that in a similar matter, because of the difference of opinion amongst two Hon'ble Judges in Income Tax Reference No. 1/88, the matter has been referred to third Hon'ble Judge under Section 259(2) of the Income-tax Act and that is pending. In that context also, the learned counsel for the assessee states that, that Reference No.1 of 1988 is of the same assessee and he makes a statement that the similar question which is pending for decision by third Hon'ble Judge in that Reference will not be pressed by the assessee for the same reason. Both the learned counsel state that in view of this statement of the learned counsel for the assessee, the question referred at the instance of the assessee need not be answered. The question referred to us at the instance of the assessee, therefore, remains unanswered.

#. The question of law referred at the instance of the Revenue now stands fully answered by the decision of the Hon'ble Supreme Court in Allied Motors (P) Ltd. v. C.I.T. reported in 224 ITR 677, in which the Hon'ble Supreme Court has held that the first proviso to Section 43B of the Income-tax Act has to be treated as restrospective. In this view of the matter, if the sum is actually paid by the assessee on or before the due date applicable in his case, for furnishing the return of income under sub-section (1) of Section 139 in respect of the previous year in which liability to pay such sum was incurred and the evidence of such payment is furnished by the assessee along with such return, the provisions of Section 43B will not apply in relation to the sum referred to in Clauses (a) or (c) or (d) or (e) or (f) thereof. In this view of the matter, the Tribunal was right in deleting the addition made by the Income-tax Officer by invoking the provision of Section 43B of the Act and directing the Income-tax Officer to allow the relief subject to necessary verification. The question referred at the instance of the Revenue is, therefore, answered in the affirmative in favour of the assessee and against the Revenue. The Reference stands disposed of accordingly with no order as to costs.

[R.K. ABICHANDANI, J.]

[K.M. MEHTA, J.]
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